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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5696-N-17]

Guidance, Waivers, and Alternative Requirements for Grantees in Receipt of Community Development Block Grant Disaster Recovery Funds Under Public Law 113-2: “Buyout” and “Acquisition” Activities; Assistance to Agricultural Enterprises; and State of Colorado Waiver for Tourism Promotion

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice provides clarifying guidance for Community Development Block Grant disaster recovery (CDBG-DR) grantees in receipt of funds under the Disaster Relief Appropriations Act, 2013 (the Appropriations Act). It provides clarification regarding the requirements of “buyout” activities authorized in the Department’s March 5, 2013, Federal Register notice and expands the eligibility criteria for buyout activities to include “Disaster Risk Reduction Areas” as defined by the grantee. It also modifies requirements of the March 5, 2013, notice on the prohibition of assistance to businesses that do not meet the Small Business Administration (SBA) definition of small businesses, permitting assistance also to eligible businesses engaged in “farming operations,” as determined by the U.S. Department of Agriculture (USDA). This notice also provides a waiver to the State of Colorado to expend additional CDBG-DR funds and to assist additional communities impacted by declared disasters in 2011, 2012, and 2013, through tourism promotion activities previously authorized in the Department’s June 3, 2014, notice.

DATES: Effective Date: **[INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Stanley Gimont, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street, SW, Room 7286, Washington, DC 20410, telephone number 202-708-3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Facsimiled inquiries may be sent to Mr. Gimont at 202-401-2044. (Except for the “800” number, these telephone numbers are not toll-free.) Emailed inquiries may be sent to disaster_recovery@hud.gov.

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I. Background

The Appropriations Act (Public Law 113–2, approved January 29, 2013) made available \$16 billion in CDBG-DR funds for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas, resulting from a major disaster declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 et. seq.) (Stafford Act) due to Hurricane Sandy and other eligible events in calendar years 2011, 2012, and 2013. On March 1, 2013, the President issued a sequestration order pursuant to section 251A of the Balanced Budget and Emergency Deficit Control Act, as amended (2 U.S.C. 901a), and reduced the amount of funding for CDBG–DR grants under the Appropriations Act to \$15.18 billion. To date, a total of \$15.18 billion has been allocated or set aside: \$13 billion in response to

Hurricane Sandy, \$514 million in response to disasters occurring in 2011 or 2012, \$655 million in response to 2013 disasters, and \$1 billion for the National Disaster Resilience Competition.

This notice applies to grantees in receipt of allocations under the Appropriations Act, which are described within the Federal Register notices published by the Department on March 5, 2013 (78 FR 14329); April 19, 2013 (78 FR 23578); May 29, 2013 (78 FR 32262); August 2, 2013 (78 FR 46999); November 18, 2013 (78 FR 69104); December 16, 2013 (78 FR 76154); March 27, 2014 (79 FR 17173); June 3, 2014 (79 FR 31964); July 11, 2014 (79 FR 40133); October 7, 2014 (79 FR 60490); October 16, 2014 (79 FR 62182); January 8, 2015 (80 FR 1039); April 2, 2015 (80 FR 17772); May 11, 2015 (80 FR 26942); and August 25, 2015 (80 FR 51589) referred to collectively in this notice as the “prior notices.” The requirements of the prior notices continue to apply, except as modified by this notice.¹

II. Applicable Rules (including Clarifying Guidance), Statutes, Waivers, and Alternative Requirements

The Appropriations Act authorizes the Secretary to waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with HUD’s obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Waivers and alternative requirements are based upon a determination by the Secretary that good cause exists and that the waiver or alternative requirement is not inconsistent with the overall purposes of Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 et seq.) (HCD Act). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5.

¹ Links to the prior notices, the text of the Appropriations Act, and additional guidance prepared by the Department for CDBG–DR grants are available on the HUD Exchange Web site: <https://www.hudexchange.info/cdbg-dr/cdbg-dr-laws-regulations-and-federal-register-notices/>.

For the waiver and alternative requirements described in this notice, the Secretary has determined that good cause exists and that the waiver and alternative requirements are not inconsistent with the overall purpose of the HCD Act. Grantees may request waivers and alternative requirements from the Department as needed to address specific needs related to their recovery activities. Under the requirements of the Appropriations Act, waivers must be published in the Federal Register no later than 5 days before the effective date of such waiver.

1. Acquisition of real property and buyouts outside of floodplains

In response to a request from the State of Colorado, HUD is authorizing grantees in receipt of CDBG-DR funds under the Appropriations Act to acquire property for an amount equal to either the property's pre-disaster or post-disaster value (formerly referenced in the prior notices as pre- and post-flood values), for the buyout of properties in "Disaster Risk Reduction Areas" as defined by criteria established by the grantee, subject to the limitations of this notice.

The Department has previously authorized CDBG-DR grantees to carry out buyout programs in floodways or floodplains, by allowing grantees to offer to acquire properties in hazardous flood areas at pre-flood or post-flood value. The Secretary authorized this type of acquisition to: (1) reduce the risk to homeowners from the effects of subsequent disasters; (2) assist in the recovery of low- and moderate-income households; and (3) protect taxpayer resources that might otherwise be needed after future disasters in the same area.

In previous notices, HUD referred to "flood buyouts" and recognized that grantees frequently used CDBG-DR funds to match funds for buyouts provided under section 404 of the Stafford Act, as amended. Section 404 empowers the Director of the Federal Emergency Management Agency (FEMA) to provide property acquisition and relocation assistance "in providing hazard mitigation assistance under this section in connection with flooding" Since flooding is by far the most prevalent and predictable source of widespread destruction in a

Presidentially declared disaster, the Department did not address the potential need to include other types of hazards. Large scale disasters have the potential to create or exacerbate hazards in areas located outside of a floodplain or floodway. For example, the wildfires that swept through Colorado in 2013 destroyed vegetation in many areas, creating erosion and affecting soil stability in a manner that now places many homes at risk for mudslides in future disasters, although those homes are not located in a floodplain or floodway.

For the same reasons that buyouts in floodways and floodplains are permitted, HUD is amending its alternative requirement to expand the scope of authorized buyouts in the prior notices for grantees receiving CDBG-DR funds under the Appropriations Act. Accordingly, the definition of “buyout” in all prior notices is amended to mean “acquisition of properties located in a floodway or floodplain that is intended to reduce risk from future flooding, or the acquisition of properties in ‘Disaster Risk Reduction Areas’ located outside of floodways and floodplains for the purpose of reducing risks from the hazard that was the basis of the Disaster Risk Reduction Area designation. ‘Disaster Risk Reduction Areas’ must be designated in accordance with the buyout requirements of applicable Federal Register Notices.”

Recognizing that States and units of general local government (UGLGs) are best positioned to determine what constitutes an unacceptable risk to their communities in exercising this additional authority, grantees will need to establish criteria to designate a “Disaster Risk Reduction Area,” subject to the following requirements: (1) The hazard must have been caused or exacerbated by the Presidentially declared disaster for which the grantee received its CDBG-DR allocation; (2) The hazard must be a predictable environmental threat to the safety and well-being of program beneficiaries, as evidenced by the best available data and science; and (3) The Disaster Risk Reduction Area must be clearly delineated so that HUD and the public may easily determine which properties are located within the Disaster Risk Reduction Area.

Once grantees have established criteria to designate a “Disaster Risk Reduction Area,” and designated a Disaster Risk Reduction Area in accordance with the established criteria, the grantee may conduct buyouts in the Disaster Risk Reduction Area only if the grantee’s approved action plan contains a description of the buyouts to be conducted in the identified Disaster Risk Reduction Areas and the national objective that the buyouts will meet. Any buyouts conducted within the Disaster Risk Reduction Area will be subject to the requirements applicable to buyouts in the March 5, 2013, notice. These requirements include restrictions on redevelopment and the discretion to determine the appropriate valuation method (including the use of pre- or post-disaster fair market value (FMV)), so long as the valuation method is uniformly applied.

2. Clarification of “buyout” and “real property acquisition” activities

CDBG-DR grantees under Public Law 113-2 that choose to undertake a buyout program have the discretion to determine the appropriate valuation method, including paying either pre-disaster or post-disaster FMV. In most cases, a program that provides *pre*-disaster FMV to buyout applicants provides compensation at an amount greater than the post-disaster FMV. When the purchase price exceeds the current FMV, any CDBG-DR funds in excess of FMV are considered assistance to the seller, thus making the seller a beneficiary of CDBG-DR assistance. If the seller receives assistance as part of the purchase price, this may have implications for duplication of benefits calculations or for demonstrating national objective criteria, as discussed below. However, a program that provides *post*-disaster FMV to buyout applicants merely provides the actual value of the property; thus, the seller is not considered a beneficiary of CDBG-DR assistance.

Regardless of purchase price, all buyout activities are a type of acquisition of real property (as permitted by section 105(a)(1) of the HCD Act). However, only acquisitions that meet the definition of a “buyout” are subject to the post-acquisition land use restrictions imposed by the

applicable prior notices. The key factor in determining whether the acquisition is a buyout is whether the intent of the purchase is to reduce risk from future flooding or to reduce the risk from the hazard that lead to the property's Disaster Risk Reduction Area designation. The distinction between buyouts and other types of acquisitions is important, because grantees may only redevelop an acquired property if the property is not acquired through a buyout program (i.e., the purpose of acquisition was something other than risk reduction). When acquisitions are not acquired through a buyout program, the purchase price must be consistent with applicable uniform cost principles (the pre-disaster FMV may not be used).

3. Clarification of ownership and maintenance requirements for property acquired through a buyout program

Any property acquired with CDBG-DR funds through a buyout program is subject to the requirement made applicable by the prior notices that property acquired through a buyout program be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or wetlands management practices. In addition, no new structure may be erected on the property other than exceptions identified in the March 5, 2013, notice, and no subsequent application for Federal disaster assistance may be made for any purpose for the property. The acquiring entity may lease such property to adjacent property owners or other parties for compatible uses in return for a maintenance agreement. Although Federal policy encourages leasing rather than selling such property, the property may also be sold. In all cases, a deed restriction or covenant running with the property must require that the buyout property be dedicated and maintained for compatible uses in perpetuity.

4. Use of low- and moderate-income housing national objective when undertaking buyout activities

In order to demonstrate that a buyout meets the Low- and Moderate-Income (LMI) Housing National Objective (LMH), grantees must meet all requirements of the HCD Act and applicable regulatory criteria described below. Grantees are encouraged to consult with HUD prior to undertaking a buyout program with the intent of using the LMH national objective.

Section 105(c)(3) of the HCD Act (42 U.S.C. 5305(c)(3)) provides that “[a]ny assisted activity under this chapter that involves the acquisition or rehabilitation of property to provide housing shall be considered to benefit persons of low- and moderate-income only to the extent such housing will, upon completion, be occupied by such persons.” In addition, the State CDBG regulations at 24 CFR 570.483(b)(3) and entitlement CDBG regulations at 24 CFR 570.208(a)(3) apply the LMH national objective to an eligible activity carried out for the purpose of providing or improving permanent residential structures that, upon completion, will be occupied by low- and moderate-income households. Therefore, a buyout program that merely pays homeowners to leave their existing homes does not result in an LMI household occupying a residential structure and thus cannot meet the requirements of the LMH national objective.

Buyout programs that assist LMI persons can be structured in one of the following ways:

(1) The buyout program combines the acquisition of properties with another direct benefit, LMI housing activity, such as down payment assistance², that results in occupancy and otherwise meets the applicable LMH housing national objective criteria in 24 CFR part 570 (e.g., if the structure contains more than two dwelling units, at least 51 percent of the units must be occupied by LMI households); (2) The program meets the low- and moderate-income area benefit criteria

² The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (URA) applies to the use of CDBG funds for down payment assistance. If down payment assistance is provided with CDBG funds awarded under the Appropriations Act (Public Law 113–2), URA requirements apply as modified by the March 5, 2013, notice (78 FR 14329). The use of other CDBG funds for down payment assistance is subject to the URA and regulatory requirements at 24 CFR 570.606. Other direct benefit LMI housing activities may also be subject to the URA.

to demonstrate national objective compliance, provided that the grantee can document that the properties acquired through buyouts will be used in a way that benefits all of the residents in a particular area where at least 51 percent of the residents are low- and moderate-income persons. When using the area benefit approach, grantees must define the service area based on the end use of the buyout properties; or (3) The program meets the criteria for the limited clientele national objective, including the prohibition on the use of the limited clientele national objective when an activity's benefits are available to all residents of the area. A buyout program could meet the national objective criteria for the limited clientele national objective if it restricts buyout program eligibility to exclusively low- and moderate-income persons, and the buyout provides an actual benefit to the low- and moderate-income sellers by providing pre-disaster valuation uniformly to those who participate in the program.

5. Clarification of definition of small business for agricultural enterprises

The March 5, 2013, notice (78 FR 14329) instituted an alternative requirement to the provisions at 42 U.S.C. 5305(a), prohibiting grantees in receipt of funds under the Appropriations Act from assisting businesses, including privately owned utilities, that do not meet the definition of a small business as defined by SBA at 13 CFR part 121. The objective of this alternative requirement is to ensure that grantees target disaster recovery resources to the unmet needs of small businesses. HUD is now modifying these criteria to better enable assistance for agricultural businesses. Businesses and entities engaged in agricultural enterprises may now be assisted if they meet the alternative eligibility criteria employed by USDA assistance programs.

The SBA small business definition establishes a much lower income threshold for agricultural enterprises than for other businesses. The SBA criteria provides a gross income limit of \$750,000 for most agricultural businesses, while the gross income limit for businesses in other sectors is \$7.5 million or higher. These gross income limitations for agricultural enterprises may

prevent CDBG-DR grantees from addressing unmet recovery needs of many agricultural businesses that would otherwise be considered small enterprises that meet the intent of HUD's requirements.

Legislation enacted in 1986 withdrew SBA's authority to provide disaster assistance loans to agricultural enterprises to ensure cooperation between USDA and SBA in the use of each agency's respective loan making authorities and to improve the delivery of disaster assistance to the agricultural segment of the country. SBA also decreased the gross income limits for the agricultural sector in its small business criteria, as described above, to further ensure that agricultural businesses would apply to USDA for other types of financial assistance. Consequently, HUD's use of the SBA definition in its March 5, 2013, notice may inadvertently limit small agricultural enterprises from accessing financial assistance through grantees' CDBG-DR programs under the Appropriations Act.

As HUD's intent to address the unmet recovery needs of small agricultural enterprises does not conflict with the goal of directing these businesses to USDA for other types of assistance, HUD is modifying its criteria for businesses engaged in agricultural enterprises to enable them to access CDBG-DR funds necessary for their recovery.

Accordingly, paragraph VI.D.41, of the March 5, 2013, notice is amended to read: "To target assistance to small businesses, the Department is instituting an alternative requirement to the provisions at 42 U.S.C. 5305(a) to prohibit grantees from assisting businesses, including privately owned utilities, that do not meet the definition of a small business as defined by SBA at 13 CFR part 121. Grantees may also assist businesses that are engaged in "farming operations," as defined at 7 CFR 1400.3, and that meet the USDA Farm Service Agency (FSA) criteria that are described at 7 CFR 1400.500 which are used by the FSA to determine eligibility for certain assistance programs."

Grantees are also reminded that this modification may allow them to add new beneficiaries or programs described within their CDBG-DR action plans for disaster recovery. These changes would constitute a substantial amendment to the CDBG-DR action plan as described in the March 5, 2013, notice (78 FR 14329) at paragraph VI.A.3.a. If applicable, grantees must submit a Substantial Action Plan Amendment revising the description of their business assistance program to include potential beneficiaries, and this amendment will be subject to the citizen participation requirements of the March 5, 2013, notice at VI.A.3, which requires no less than 7 calendar days to solicit public comment.

6. Waiver to permit some activities in support of the tourism industry (State of Colorado only)

In the Federal Register notice published on June 3, 2014 (79 FR 31964), the Department granted the State of Colorado a waiver of 42 U.S.C. 5305(a) to make eligible the use of up to \$500,000 in CDBG-DR funds to support the State's tourism industry and to promote travel to the most impacted and distressed areas related to the 2013 floods. This notice replaces the previous waiver and authorizes the State to provide an additional \$768,300 in CDBG-DR funds to support tourism promotion activities, increasing the amount covered by the waiver from \$500,000 to \$1,268,300. In addition, this revised waiver permits the State to support its tourism industry and promote travel to the most impacted and distressed counties that had a declared major disaster in 2011, 2012, or 2013, including those impacted by disasters other than flooding.

Using the funds provided under the initial waiver, the State established its first CDBG-DR Tourism Marketing Grant Program and received applications requesting a total of \$787,927. Through this program, the State awarded eight grants totaling \$500,000 in CDBG-DR funding to support a variety of activities such as advertising, marketing campaigns, promotion of community and spectator events, and website improvements in targeted areas that had experienced a reduction in tourism revenues following the 2013 floods in Colorado. This funding fell short of meeting the

tourism promotion priorities identified through the initial round of State funding by \$287,927.

The State has also subsequently identified \$480,373 in additional funding opportunities for the original applicants who were constrained by the initial grant size limitation, as well as for potential new applicants made eligible through the inclusion of areas impacted by disasters other than flooding.

In support of this request, the State has conducted an analysis of retail sales that indicates that the flooding and wildfire disasters continue to negatively affect local tourism revenues. Tourism is the primary economic contributor to the State of Colorado's economy and provides a valuable source of business revenue, taxes, and employment. According to analyses provided by the State, businesses supported by tourism, including hotels, lodges, restaurants, and grocery stores, are still experiencing weakened sales revenue. Tax revenue from these businesses benefits the State's economy and provides funding for other State activities and services. In addition, this industry employs many individuals who are of low- and moderate-income; thus, this population has been inordinately affected by the decrease in tourism revenue. Some of these jobs have been lost as a result of the disasters.

Because communities are diverting disposable tax revenue to physical recovery projects, funding for tourism marketing is scarce and communities face a worsening economic cycle from which the areas cannot recover without the injection of supplemental assistance. Therefore, the State has requested that an additional \$768,300 of its total CDBG-DR award be made eligible for such tourism promotion activities. HUD continues to support the use of CDBG-DR funds in this scenario as a recovery tool in a damaged regional economy that depends on tourism for many of its jobs and tax revenue.

As the State of Colorado is proposing to use these additional funds for advertising and marketing activities that broadly support its tourism industry, rather than direct assistance to

tourism-dependent businesses, and because long-term benefit from the proposed activities must be derived using indirect means, 42 U.S.C. 5305(a) is waived only to the extent necessary to make eligible an additional \$768,300 to support tourism promotion activities. The State must award the additional \$768,300 in CDBG-DR funds competitively through its existing CDBG-DR Tourism Marketing Grant Program to public or nonprofit entities that promote travel to or within a community or communities in general, provided the assisted activities are designed to support tourism to areas most impacted and distressed by a major disaster declared in 2011, 2012, or 2013.

As an additional condition of expanding this waiver, the State must demonstrate that funds will supplement and not replace State and local funding sources for this purpose. In its request for this waiver, the State indicated that entities selected for an award also pledged nearly a one-for-one match for their projects. The State may demonstrate that CDBG-DR funds will supplement, but not replace, local funding by requiring a match, including provision for in-kind contributions, similar to the existing competitive grant program offered by the Colorado Tourism Office. However, if the State does not require a match, the State must identify another means to adequately demonstrate that funds will supplement, but not supplant, State and local resources typically dedicated to promote tourism in these impacted areas.

The additional funds provided through this waiver for the State's CDBG-DR Tourism Marketing Grant Program are subject to all requirements in the notice published on June 3, 2014 (79 FR 31964), unless otherwise modified through this notice. The funds permitted under this waiver are subject to the same obligation and expenditure deadline applicable to all funds under the Appropriations Act. Therefore, this waiver remains in effect until 2 years following HUD's obligation of the funds permitted under this waiver.

The State is reminded that this expanded waiver will allow them to add new beneficiaries described within their CDBG-DR action plans for disaster recovery. These changes would constitute substantial amendments as described in the March 5, 2013 notice (78 FR 14329), at paragraph VI.A.3.a. If applicable, the State must submit a Substantial Action Plan Amendment revising its description of its CDBG-DR Tourism Marketing Grant Program to include potential beneficiaries, and this amendment will be subject to the citizen participation requirements of the March 5, 2013, notice at VI.A.3, which requires no less than 7 calendar days to solicit public comment.

III. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the disaster recovery grants under this notice is 14.269.

IV. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at [24 CFR part 50](#), which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by

calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the Federal Relay Service, toll-free, at 800–877–8339.

Dated: November 10, 2015.

Nani Coloretti,
Deputy Secretary.

[FR-5696-N-17]

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